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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 In re] Case No. 98-51326-ASW
11 H. Keith Henson,] Chapter 7
12 Debtor(s).]
13 _____]

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15 ORDER
16 APPROVING COMPENSATION APPLICATION OF
17 TRUSTEE'S ATTORNEY JUDITH S. SUELZLE
18 ON AN INTERIM BASIS, IN PART,
19 AND
20 OVERRULING OBJECTION OF
21 RELIGIOUS TECHNOLOGY CENTER, IN PART
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Before the Court is a Final Application for Compensation ("Application") by Judith S. Suelzle ("Applicant"). The Application seeks payment of fees totalling \$34,866 and reimbursement of costs totalling \$2,383.76, both incurred by Applicant in her role as counsel for Carol Wu ("Trustee"), the

ORDER
APPROVING COMPENSATION APPLICATION OF
TRUSTEE'S ATTORNEY JUDITH S. SUELZLE
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OVERRULING OBJECTION OF
RELIGIOUS TECHNOLOGY CENTER, IN PART

1 trustee of this Chapter 7¹ estate. Applicant represents herself
2 with respect to the Application.

3 An objection to the Application has been filed by Religious
4 Technology Center ("Creditor"), a creditor asserting a secured
5 claim against the estate that may be unsecured to an extent not yet
6 determined. Creditor is represented by Elaine M. Seid, Esq. of
7 McPharlin, Sprinkles & Thomas LLP; Helena K. Kobrin, Esq.
8 ("Kobrin") of Moxon & Kobrin; and Samuel D. Rosen, Esq.

9 Keith Henson, the Debtor ("Debtor") in this bankruptcy case,
10 has taken no position concerning the Application.

11 The Application is supported by Arel Lucas ("Lucas"), the
12 Debtor's wife, who asserts a co-ownership interest in the real
13 property that was the Debtor's residence when the bankruptcy case
14 was commenced ("Real Property"), and the proceeds of its sale.
15 Lucas is represented by Wayne A. Silver, Esq. of the Law Offices of
16 Wayne Silver.

17 The Application is also supported by the office of the United
18 States Trustee ("UST"), which is represented by John Wesolowski,
19 Esq.

20 The matter has been briefed and argued, and submitted for
21 decision.

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25 ¹ Unless otherwise noted, all statutory references are to
26 Title 11, United States Code ("Bankruptcy Code"), as applicable
27 when this bankruptcy case was commenced by the filing of a petition
under Chapter 13 on February 28, 1998; the case was converted to
Chapter 7 on February 7, 2003.

1 ANALYSIS

2 Creditor's objection is both general and specific.

3
4 A. General Lack Of Benefit

5 Creditor complains that Applicant's services to the Trustee did
6 not benefit the estate because her work accomplished little except
7 sale of the Real Property, which Creditor contends did not produce
8 enough to pay any claims other than administrative expenses.

9 That position appears to be based on Creditor's misconception
10 that the Real Property was worth only \$410,000, whereas the actual
11 sale price was \$605,000. Creditor relies upon what it describes as
12 an "evidentiary stipulation", which assumed a \$410,000 value when
13 the bankruptcy case commenced in 1998. However, that stipulation
14 was made for purposes of trying Creditor's motion to dismiss the
15 Chapter 13 case and Creditor's objection to confirmation of the
16 Debtor's Chapter 13 plan; after trial, the case was converted
17 without a plan having been confirmed and the stipulated value,
18 which no longer served any purpose, ceased to apply. The general
19 rule is that post-petition appreciation accrues to the Chapter 7
20 estate rather than to the Debtor, see In re Hyman, 967 F.2d 1316
21 (9th Cir. 1992). Creditor cites In re Kuhlman, 254 B.R. 755
22 (Bankr.N.D.Cal. 2000) ("Kuhlman") for the proposition that
23 §348(f)(1) leads to a different result when a case is converted to
24 Chapter 7 from Chapter 13 -- that subsection provides (in pertinent
25 part) as follows:

26 ... when a case under chapter 13 of this title is
27 converted to a case under another chapter under

1 this title ... (B) valuations of property and of
2 allowed secured claims in the chapter 13 case
3 shall apply in the converted case, with allowed
4 secured claims reduced to the extent that they
5 have been paid in accordance with the chapter 13
6 plan.

7 Kuhlman explains (at 757) that "confirmation of a Chapter 13 plan
8 is an implicit valuation which meets the requirement of
9 §348(f)(1)(B), so that postpetition appreciation belongs to the
10 debtor". However, in that case as in this one, the case was
11 converted without a plan ever being confirmed, so there was no
12 "valuation[] of property" made in the Chapter 13 case. The
13 "evidentiary stipulation" of value that was made during this case's
14 Chapter 13 phase for purposes of a dismissal motion and an
15 objection to confirmation should not be applied beyond its original
16 scope and treated as an actual "valuation[] of property" for the
17 quite different purposes that are served by §348(f)(1) after a case
18 has been converted. Indeed, there is no record that the Debtor
19 himself asserts an entitlement to post-petition appreciation, and
20 he appears to make no claim to the sale proceeds other than for his
21 homestead exemption. Finally, other creditors in the case were not
22 parties to the stipulation and therefore should not be treated as
23 bound by it, and they may benefit from the Real Property having
24 been sold for a price that far exceeds the stipulated value.

25 Creditor does not dispute that, in Chapter 7, the Real Property
26 was sold for \$605,000, with proceeds of \$290,429 remaining after
27 the deed of trust, property tax liens, and sale costs were paid.
28 Those proceeds are being held by the Trustee subject to Lucas'
29 claim for half of them based on a joint tenancy interest, which

ORDER
APPROVING COMPENSATION APPLICATION OF
TRUSTEE'S ATTORNEY JUDITH S. SUELZLE
ON AN INTERIM BASIS, IN PART, AND
OVERRULING OBJECTION OF
RELIGIOUS TECHNOLOGY CENTER, IN PART

1 claim Creditor disputes. The proceeds are also subject to a
2 judgment lien held by Creditor and disputed by the Debtor, the
3 extent of which has not been determined; Creditor's most recent
4 proof of claim on file asserts a secured claim of at least \$75,000
5 and a total claim of \$222,651.83. The proceeds are further subject
6 to the Debtor's claim of homestead exemption, which he has agreed
7 to limit to \$66,000 and subordinate to the extent of \$40,000, which
8 claim may be opposed by Creditor.

9 Just as the amount of net proceeds cannot yet be known, the
10 amount of administrative expenses is not yet known. Applicant
11 states that, while the Trustee's maximum commission under §326(a)
12 based on the Real Property's sale price would be \$33,500, the
13 Trustee has "repeatedly" said that she will charge her regular
14 hourly rate, which totalled less than \$19,000 as of February 2004.
15 Creditor points out that the Trustee has retained new counsel
16 following Applicant's retirement, and the amount of that
17 compensation is not yet known. Applicant notes that the Debtor's
18 attorney has received approval of only \$5,568 in fees to date, and
19 any additional charges incurred while the case was in Chapter 13
20 may or may not be allowed in full. Applicant also points out that
21 some administrative expenses might prove to be recoverable by the
22 estate through surcharging Creditor's lien under §506(c).

23 Applicant is correct that, while it could not be said with
24 certainty when the sale was made that it would produce funds for
25 creditors, neither was it definite that sale would not do so; that
26 still remains to be seen. However, it was clear at the time of
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1 sale that, if the Real Property were not sold, it would likely be
2 lost to foreclosure because no one was making payments on the deed
3 of trust -- further, it was vacant, not being maintained, and
4 uninsured. Accordingly, sale of the Real Property was provident
5 when accomplished, based on the facts known to the Trustee at that
6 time. Creditor urges that all creditors would have been better
7 served by dismissal of the case soon after conversion, which would
8 have left all parties to their state law remedies rather than
9 having the Real Property liquidated under Chapter 7. But it was
10 not within the Trustee's power to dismiss the case. She did
11 support an unsuccessful post-conversion dismissal motion by
12 Creditor, which was denied -- the Trustee was then required to
13 administer the assets in the estate, which she did by selling the
14 Real Property to preserve its equity for the several competing
15 interests.

16 Applicant cites In re Mednet, 251 B.R. 103 (9th Cir. BAP 2000)
17 ("Mednet") for the proposition that counsel's services need not
18 confer a material benefit upon the estate so long as they were
19 reasonably likely to benefit the estate when rendered. That case
20 interpreted and applied §330(a)(3)(C), under which a factor to be
21 considered in determining a "reasonable" amount of compensation is
22 "whether the services were necessary to the administration of, or
23 beneficial at the time at which the service was rendered toward the
24 completion of" the bankruptcy case. In this case, it was not clear
25 at the time of sale whether selling would prove to be futile for
26 creditors or beneficial to them -- it is still unclear. However,

27
28 ORDER
APPROVING COMPENSATION APPLICATION OF
TRUSTEE'S ATTORNEY JUDITH S. SUELZLE
ON AN INTERIM BASIS, IN PART, AND
OVERRULING OBJECTION OF
RELIGIOUS TECHNOLOGY CENTER, IN PART

1 Applicant could not reasonable have waited until the amount of
2 benefit to unsecured creditors of selling the Real Property was
3 known. The Trustee had to act to sell the Real Property or lose it
4 to foreclosure. If it was lost to foreclosure, the very real
5 possibility that its substantial equity would be available to
6 creditors would be eliminated.

7
8 B. Specific Objections

9 Creditor's specific objections fall into the following
10 categories.

11
12 (1) Assisting Fugitive

13 Creditor contends that some of Applicant's services benefitted
14 the Debtor and were performed after the UST had taken the position
15 that the Debtor is a fugitive whose efforts to avoid justice in
16 America should not be aided by representatives of the government
17 and the courts. Applicant correctly points out that the services
18 in question were all connected with administration of the
19 bankruptcy estate's assets, such as selling the Real Property, and
20 were not performed for the exclusive benefit of the Debtor or at
21 the expense of the estate's own interests.

22 The fact that a service may simultaneously benefit both the
23 estate and someone else does not detract from the estate's need for
24 that service and its value to the estate under §330(a)(3)(C), and
25 Creditor cites no authority to the contrary. Further, as noted
26 above, not only does the UST raise no objection to the Application
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(on this or any other basis), but the UST expressly supports it.

(2) Dischargeability Actions

Creditor complains of charges for Applicant's time spent reviewing pleadings served on her in Adversary Proceedings for determination of the dischargeability of specific debts, to which the Trustee is not a party. Applicant points out that she had a duty to review pleadings served upon her to determine whether they might affect the estate, such as a motion filed by Creditor in one of the Adversary Proceeding that sought to dismiss the bankruptcy case as a sanction for the Debtor's failure to respond to discovery requests. Creditor notes that it also filed that dismissal motion in the bankruptcy case itself.

This Court agrees with Applicant that counsel for a trustee has a duty to review pleadings served upon her. The charges in question here total only \$468, so it appears that the review was reasonable and not excessive for the purpose.

(3) Correction of Errors

Creditor argues that Applicant should not charge the estate for services performed to correct errors made by Applicant herself.

One of those charges is \$39 for extra time spent on close of escrow due to Applicant's failure to include the term "free and clear" in the order authorizing sale of the Real Property. Applicant offers no explanation, and this Court agrees that the estate should not pay for that charge.

1 The other charges were made in connection with pleadings filed
2 by Applicant that disclosed settlement negotiations, Creditor's
3 objection to the disclosures, and Applicant's steps to have the
4 disclosures removed from the Court's file and placed under seal.
5 Creditor alleges that the disclosures were improper and Applicant
6 argues that they were not, because she was not attempting to use
7 the disclosed information against Creditor but sought merely to
8 explain to the Court why the Trustee had not accepted settlement
9 proposals that had previously been discussed on the record.
10 Creditor argues that settlement negotiation had not previously been
11 disclosed on the record.

12 The issue of whether the disclosures were or were not improper
13 is not directly before the Court, but the Court notes that
14 disclosure of settlement negotiations is not always prohibited by
15 the Federal Rules of Evidence ("FRE"):

16 Evidence of (1) furnishing or offering or
17 promising to furnish, or (2) accepting or
18 offering or promising to accept, a valu-
19 able consideration in compromising or attempt-
20 ing to compromise a claim which was disputed
21 as to either validity or amount, is not ad-
22 missible to prove liability for or invalidity
23 of the claim or its amount. Evidence of con-
24 duct or statements made in compromise negotia-
25 tions is likewise not admissible. This rule
does not require the exclusion of any evidence
otherwise discoverable merely because it is
presented in the course of compromise negotia-
tions. This rule also does not require ex-
clusion when the evidence is offered for an-
other purpose, such as proving bias or prej-
udice of a witness, negating a contention
of undue delay, or proving an effort to obstruct
a criminal investigation or prosecution.

26 FRE 408. Applicant states without contradiction that she made the
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1 disclosures only to explain why various disputes had not been
2 settled, and then sought to remove them from the file when Creditor
3 complained. Under such circumstances, the disclosures were not
4 necessarily made in error, such that the estate should not pay for
5 Applicant's time spent having the record sealed in order to
6 accommodate Creditor's objection to them.

7
8 (4) Meeting

9 Creditor objects to \$292.50 charged for a ninety minute meeting
10 between Applicant and Creditor's attorney Kobrin on February 21,
11 2003, because Kobrin's records reflect no such meeting and show
12 that she was not in the area on that date. Applicant notes that
13 Creditor does not deny that such a meeting ever took place, and
14 concedes that the Application may state the wrong date.

15 The purpose of the meeting as described by the Application is
16 "to discuss history of the case", which was converted to Chapter 7
17 on February 7, 2003. This Court considers it more likely than not
18 that a ninety minute meeting between the respective attorneys for
19 the Trustee and Creditor was held for that purpose shortly after
20 conversion, especially since Creditor does not deny as much but
21 merely disputes the exact date of the meeting. The Court concludes
22 that the meeting did occur and that Applicant should be paid for
23 her time in participating in it.

24
25
26 (5) Appeal

1 Creditor appealed this Court's orders denying a motion to
2 dismiss the case and approving sale of the Real Property, and
3 Applicant then spent time electing to have those appeals heard by
4 the District Court rather than by the Bankruptcy Appellate Panel.
5 Creditor contends that the estate received no benefit from those
6 services, and Applicant explains that the Trustee believed that the
7 District Court could handle the appeals with less time and expense
8 because it had heard previous appeals in the bankruptcy case and
9 was familiar with the matter.

10 Rule 8001(e) of the Federal Rules of Bankruptcy Procedure and
11 28 U.S.C. §158(c) provide for forum selection, and counsel for all
12 parties to an appeal clearly have a right to consider whether to do
13 so. Applicant's stated reason for deciding to make the selection
14 is meritorious, but the issue before this Court is not where the
15 appeals should be heard, it is merely whether Applicant should have
16 spent time considering whether one forum was preferable to the
17 other -- that task was well within her duties as counsel for the
18 Trustee.

19
20 (6) Clerical Tasks

21 Creditor argues that a charge for six minutes' time totalling
22 \$19.50 to "review and record notice of change of address" for one
23 of Creditor's attorneys was a "secretarial function". Applicant
24 does not respond to this objection.

25 The Court notes that it would not be a secretarial function for
26 Applicant to review the notice of address change and direct a clerk
27

1 to record it in such records as counsel considered to be
2 appropriate, which task could easily take six minutes.

3
4 (7) Order Shortening Time

5 Creditor argues that there was no need to apply for an order
6 permitting the Application to be heard on shortened time, so the
7 estate did not benefit and should not pay \$117 for the time devoted
8 to that task. The request for the order shortening time states
9 that Applicant was retiring and wished to have the Application
10 heard before she closed her office.

11 Reasonable accommodation to suit the convenience of counsel is
12 a legitimate basis for shortened time, and making such a request is
13 within the scope of §330(a)(3)(C) for services that "were necessary
14 to the administration of, or beneficial at the time at which the
15 service was rendered toward the completion of" the bankruptcy case.

16
17 (8) Duplication

18 Creditor notes that charges for \$58.50 on April 3, 2003 and \$39
19 on June 16, 2003 duplicate other charges, and that Applicant so
20 conceded at a hearing on January 30, 2004. It is true that
21 Applicant made that concession at that hearing, and she does not
22 contend otherwise now.

23
24 Conclusion

25 This Application may be approvable as a final application under
26 Mednet, because the Court has found that the Trustee's decision to

1 sell the Real Property was provident when made. However, as noted
2 by In re Strand, 375 F.3d 854 (9th Cir. 2004), interim compensation
3 awards are reviewable at any time during the case, and such
4 flexibility should remain available until this estate is ready to
5 be closed. Applicant herself notes the many unresolved issues
6 concerning both the amount of net proceeds and the amount of
7 administrative claims, which would not permit the estate to pay any
8 part of this Application now even if final approval were granted.
9 Accordingly, the Application will not be finally approved at this
10 time, but it will be approved on an interim basis except for the
11 charges totalling \$136.50 that are described above (\$39 for
12 correction of errors plus \$97.50 in duplicate charges). Such
13 interim approval is without prejudice to Applicant seeking final
14 approval at any appropriate time in the future, whether when the
15 Trustee's final report is heard or at such earlier time as the
16 actual benefit of Applicant's services to the estate can be
17 assessed as an element of the Court's final review of the
18 Application. The Trustee is authorized to pay some or all of the
19 compensation that is approved on an interim basis, whenever she
20 considers the estate to be in a position to do so, subject to later
21 review for final approval (and any disgorgement that might then be
22 necessary).

23 The objection of Creditor is overruled except with respect to
24 the charges totalling \$136.50 that are described above.

25 Applicant shall submit a form of order so providing, after
26 review by counsel for Creditor.

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28 ORDER
APPROVING COMPENSATION APPLICATION OF
TRUSTEE'S ATTORNEY JUDITH S. SUELZLE
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RELIGIOUS TECHNOLOGY CENTER, IN PART

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Dated:

ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

ORDER
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RELIGIOUS TECHNOLOGY CENTER, IN PART